

SERVED: June 22, 1993

NTSB Order No. EA-3907

UNITED STATES OF AMERICA  
**NATIONAL TRANSPORTATION SAFETY BOARD**  
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 7th day of June, 1993

JOSEPH M. DEL BALZO,	)	
Acting Administrator,	)	
Federal Aviation Administration,	)	
	)	
Complainant,	)	
	)	Docket SE-11065
v.	)	
	)	
EUGENE H. BUBOLTZ,	)	
	)	
Respondent.	)	
	)	

**OPINION AND ORDER**

Respondent has appealed from the oral initial decision issued by Administrative Law Judge Joyce Capps at the conclusion of an evidentiary hearing held in this matter on April 30, 1991.<sup>1</sup> In that decision the law judge affirmed the Administrator's order suspending respondent's airline transport pilot certificate (with waiver of sanction) based on his violation of 14 C.F.R.

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<sup>1</sup> Attached is an excerpt from the hearing transcript containing the oral initial decision.

91.87(h).<sup>2</sup> For the reasons discussed below, we deny the appeal and affirm the initial decision.

Respondent does not deny that on April 22, 1988, while serving as pilot in command of Express Airlines I, Inc. ("Express Airlines") flight # 2587, he entered Runway 11 Right at Minneapolis/St. Paul International Airport without an air traffic control (ATC) clearance to do so. Respondent's first officer, who was handling radio communications with ATC at the time, apparently mistook a clearance for another Express Airlines flight (with a radio call sign of "Flagship 2571") to taxi into position on Runway 11 Left,<sup>3</sup> as a clearance for their aircraft ("Flagship 2587") to taxi into position on Runway 11 Right.<sup>4</sup>

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<sup>2</sup> Section 91.87(h) [now recodified as § 91.129(i)] provided, in pertinent part:

**§ 91.87 Operation at airports with operating control towers.**

(h) **Clearances required.** No person may, at any airport with an operating control tower, operate an aircraft on a runway or taxiway, or takeoff or land an aircraft, unless an appropriate clearance is received from ATC.

<sup>3</sup> The ATC transmission was:

Flagship twenty five seventy one Minneapolis tower taxi into position one one left there will be a slight delay for heavy wake turbulence traffic departing parallel.

(Exhibit A-1, A-4, as amended at Tr. 13.)

<sup>4</sup> Respondent testified that the first officer transmitted an acknowledgment of the clearance. (Tr. 50.) The law judge appears to have accepted respondent's testimony, noting that the tape recording of relevant ATC transmissions contained "some other activity" simultaneous with the acknowledgment from Flagship 2571. She stated, however, that she could not "make out . . . what the other language was." (Tr. 78.) The tower controller testified that at the time he heard only one

Respondent, who was monitoring ATC communications, testified that he heard only that a Flagship aircraft had been cleared to position and hold. He asked his first officer whether the clearance was for them, and when the first officer said it was, respondent proceeded to taxi into position on Runway 11 Right. As a result of this unauthorized entry onto the runway, a DC-10 aircraft preparing to land on that runway was required to make a go-around.

At the hearing, respondent's defense was twofold: (1) that the tower controller should have warned respondent's aircraft that an aircraft with a similar call sign was also on the frequency; and (2) that he was entitled to rely on his first officer's statement that the "taxi into position" clearance was for their aircraft. The law judge rejected both defenses, finding that (1) the call signs of the two aircraft were not so similar as to obligate ATC to issue a warning;<sup>5</sup> and (2) since respondent was listening to ATC transmissions and was not engaged in any other required activity, he could not escape responsibility for his violation by claiming he relied on his first officer. (Tr. 77, 79-80.) Respondent appeals to the Board only from the law judge's rejection of his reliance defense.

(..continued)

acknowledgement of the clearance, but after listening to the tape at the hearing he agreed that what might be a simultaneous acknowledgment from respondent's aircraft is audible on the tape. (Tr. 11-2, 15-6.) The first officer did not testify.

<sup>5</sup> The law judge noted that respondent should have paid special attention to the last two numbers of the call sign, since he was aware that all Express Airlines flights had ATC radio call signs beginning with "Flagship 25." (Tr. 77.)

Respondent argues that, under the circumstances of this case it was reasonable for him to rely on the first officer's statement that the taxi clearance was for their aircraft because: (1) the aircraft in front of them (a DC-10 "heavy") had just been cleared for takeoff from Runway 11 Right and respondent's aircraft was therefore number one for takeoff on that runway; (2) he heard a clearance for a Flagship aircraft to taxi into position, and a reference to "heavy wake turbulence" due to departing traffic; (3) he was not aware of any other Flagship aircraft preparing to take off; and (4) he knew his first officer to be a "very good pilot." Respondent also argues that the law judge appears to have faulted him simply for missing part of the clearance, and that her limitation of the reliance defense to instances where the relying pilot is engaged in other required activity is contrary to our case law pertaining to the reliance defense.<sup>6</sup>

We conclude that, notwithstanding the factors cited by respondent, his reliance on the first officer's statement was not reasonable and therefore cannot excuse his violation.

We have held that, in general, the pilot in command is responsible for the overall safe operation of the aircraft and that he can avoid responsibility for a violation only if: a particular task is the responsibility of another; he has no independent obligation or ability to ascertain the information;

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<sup>6</sup> Respondent cites Administrator v. Coleman, 1 NTSB 229 (1968), Administrator v. Thomas, 3 NTSB 349 (1977), and Administrator v. Crawford, 5 NTSB 1000 (1986).

and he has no reason to question the other's performance. Administrator v. Fay and Takacs, NTSB Order No. EA-3501 at 9 (1992). Respondent admitted that he heard portions of the disputed clearance, and that what he heard created some doubt as to whether the clearance was intended for his aircraft. (Tr. 50, 53, 58.) It is also apparent from the record that, other than monitoring ATC communications, respondent was not occupied with any other flight duties which would have prevented him from verifying with ATC that they were cleared to enter the runway. Thus, not only did respondent have reason to question the first officer's characterization of the clearance,<sup>7</sup> but he also had the ability and opportunity to personally ascertain whether his flight was cleared.

We do not agree with respondent that he is being faulted for having missed part of the clearance, although that fact does suggest to us that respondent may not have been paying close enough attention to ATC communications during this critical period of flight. Vital to our decision is the fact that he failed to take the opportunity to overcome that lapse by seeking ATC clarification of the partially-missed transmission. This result is not inconsistent with our precedent. As we said in Administrator v. Leenerts, NTSB Order No. EA-2845 at 9 (1988), we prefer "to look at the facts of each case and to determine, on

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<sup>7</sup> See Administrator v. Chaille, NTSB Order No. EA-3643 at 4 (1992) (reliance defense should not be extended to situations where the pilot seeking to rely on the radio operator has reason to doubt the accuracy of the advice he is given by the other pilot).

the basis of the entire circumstances, whether reliance was reasonable."

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Respondent's appeal is denied; and
2. The initial decision is affirmed.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.